ORIGINAL

NO. 87-6138

IN THE

UNITED STATES SUPREME COURT

OCTOBER TERM, 1987

WILLIE MACK MODDEN,

Petitioner,

v.

THE STATE OF TEXAS,

Respondent.

On Petition For Writ Of Certiorari
To The Texas Court Of Criminal Appeals

RESPONDENT'S BRIEF IN OPPOSITION

JIM MATTOX
Attorney General of Texas

MARY F. KELLER
First Assistant
Attorney General

LOU McCREARY
Executive Assistant
Attorney General

MICHAEL P. HODGE
Assistant Attorney General
Chief, Enforcement Division

ROBERT S. WALT*
Assistant Attorney General

MARGARET PORTMAN GRIFFEY
Assistant Attorney General

P.O. Box 12548, Capitol Station
Austin, Texas 78711
(512) 463-2080

---

* Counsel of Record

QUESTIONS PRESENTED

I. WHETHER THE PROSECUTOR'S ARGUMENT MISLEAD THE JURORS AS TO THEIR RESPONSIBILITY FOR ASSESSING PUNISHMENT?

II. WHETHER THE PROSECUTOR'S PROPER USE OF CHALLENGES FOR CAUSE, WHICH RESULTED IN THE REMOVAL OF BLACK VENIRE MEMBERS, IMPLICATES THE SIXTH AMENDMENT?

TABLE OF CONTENTS

	Page
QUESTIONS PRESENTED	i
TABLE OF AUTHORITIES	iii
OPINION BELOW	1
JURISDICTION	2
CONSTITUTIONAL PROVISIONS INVOLVED	2
STATEMENT OF THE CASE	2
STATEMENT OF FACTS	2
SUMMARY OF ARGUMENT	2
REASONS FOR DENYING THE WRIT	3
I. THE QUESTIONS PRESENTED FOR REVIEW ARE UNWORTHY OF THIS COURT'S ATTENTION.	3
II. THE PROSECUTOR'S ARGUMENT DID NOT MISLEAD THE JURORS AS TO THEIR RESPONSIBILITY FOR ASSESSING PUNISHMENT.	4
III. THIS COURT IS WITHOUT JURISDICTION TO CONSIDER MODDEN'S CLAIM THAT THE PROSECUTION'S USE OF PEREMPTORY CHALLENGES AND CHALLENGES FOR CAUSE VIOLATED THIS COURT'S RULING IN BATSON V. KENTUCKY.	7
IV. THE PROSECUTOR'S PROPER USE OF CHALLENGES FOR CAUSE, WHICH RESULTED IN THE REMOVAL OF BLACK VENIRE MEMBERS, DOES NOT IMPLICATE THE SIXTH AMENDMENT.	9
V. THIS COURT IS WITHOUT JURISDICTION TO CONSIDER MODDEN'S CLAIM THAT THE TEXAS CAPITAL SENTENCING STATUTE IMPERMISSIBLY PRECLUDES MEANINGFUL CONSIDERATION OF MITIGATING EVIDENCE BY THE JURY.	10
CONCLUSION	10

TABLE OF AUTHORITIES

Cases	Page
Adams v. Texas, 448 U.S. 38 (1980)	5,9
Batson v. Kentucky, 476 U.S. 79 (1986)	3,7,8,9
Beck v. Washington, 369 U.S. 541 (1962)	8
Caldwell v. Mississippi, 472 U.S. 320 (1985)	2,4,5
California v. Brown, 479 U.S. ___, 107 S.Ct. 837 (1987)	5
California v. Ramos, 463 U.S. 992 (1983)	5
Cardinale v. Louisiana, 394 U.S. 437 (1969)	8
Crowell v. Randell, 10 Pet. 368 (1836)	8
Darden v. Wainwright, 477 U.S. ___, 106 S.Ct. 2464 (1986)	7
Godchaux Co., Inc. v. Estopinal, 251 U.S. 179 (1919)	8
Heath v. Alabama, ___ U.S. ___, 106 S.Ct. 433 (1985)	8
Hill v. California, 401 U.S. 797 (1971)	8
Illinois v. Gates, 462 U.S. 213 (1983)	8
Lockhart v. McCree, 476 U.S. 162 (1986)	9
Owings v. Norwood's Lessee, 5 Cranch 344 (1809)	8
Strauder v. West Virginia, 100 U.S. 303 (1880)	9
Tacon v. Arizona, 410 U.S. 351 (1973)	8
Taylor v. Louisiana, 419 U.S. 522 (1975)	9
United States v. Young, 470 U.S. 1 (1985)	7
Wainwright v. Witt, 469 U.S. 412 (1985)	5,9

Constitutions, Statutes and Rules	
U. S. Const., amend. VI	passim
U. S. Const., amend. VIII	2,4
28 U.S.C. § 1257(3)	2
Sup. Ct. R. 17	2,3
Judiciary Act of 1789, 20 § 25, 1 Stat. 85	8
Tex. Crim. Proc. Code Ann. § 35.16(b)	9
Tex. Code Crim. Proc. Ann. art. 37.071 (Vernon Supp. 1987)	2

NO. 87-6138

IN THE

UNITED STATES SUPREME COURT

OCTOBER TERM, 1987

WILLIE MACK MODDEN,

Petitioner,

v.

THE STATE OF TEXAS,

Respondent.

On Petition For Writ Of Certiorari
To The Texas Court Of Criminal Appeals

RESPONDENT'S BRIEF IN OPPOSITION

TO THE HONORABLE JUSTICES OF THE SUPREME COURT:

NOW COMES the State of Texas, Respondent[1] herein, by and through its attorney, the Attorney General of Texas, and files this Brief in Opposition.

OPINION BELOW

The opinion of the Texas Court of Criminal Appeals affirming Modden's conviction is attached to the petition for writ of certiorari as an appendix. Modden v. State, 721 S.W.2d 859 (Tex. Crim. App. 1986). Modden did not seek rehearing.

[1]For clarity, the Respondent is referred to as "the state," and Petitioner as "Modden."

JURISDICTION

Modden seeks to invoke this Court's jurisdiction pursuant to 28 U.S.C. § 1257(3).

CONSTITUTIONAL PROVISIONS INVOLVED

Modden bases his claims upon the Sixth and Eighth Amendments to the United States Constitution.

STATEMENT OF THE CASE

Modden was indicted on October 31, 1984, in the 159th Judicial District Court of Angelina County, Texas, for the capital murder of Deborah Davenport during the course of committing and attempting to commit the offense of robbery. On January 29, 1985, Modden was found guilty of the charged offense by a jury, and on January 31, after a separate punishment hearing, the jury affirmatively answered the two special issues submitted pursuant to Tex. Code Crim. Proc. Ann. art. 37.071 (Vernon Supp. 1987). Punishment was assessed at death as required by law. The Texas Court of Criminal Appeals affirmed the conviction and sentence on December 17, 1986. Modden v. State, 721 S.W.2d 859 (Tex. Crim. App. 1986).

STATEMENT OF FACTS

The facts of the offense are not relevant to the questions presented to the Court. The circumstances relevant to the issues are delineated with the discussion of each issue.

SUMMARY OF ARGUMENT

Rule 17 of the Rules of the Supreme Court provides that review on writ of certiorari is not a matter of right but of judicial discretion, and will be granted only when there are special and important reasons therefor. Modden has advanced no special and important reason in this case, and none exists.

Modden claims that the prosecutor's closing argument violated this Court's mandate in Caldwell v. Mississippi, 472 U.S. 320 (1985), by leading the jury to believe that responsibility for determining the appropriateness of the death penalty rested outside the jury. Modden's interpretation of the challenged argument ignores the clear import of the language employed

by the prosecutor. Moreover, the challenged argument was "invited" by the improper arguments of defense counsel which encouraged the jurors to disregard the requirement that their answers to the statutory punishment questions be based on evidence before them. An ideological viewpoint that the death penalty is in all circumstances inappropriate was urged upon the jury, and they were requested to return a "no" answer to at least one of the statutory questions based on this viewpoint. Defense counsel further analogized the assessment of the death penalty to a deliberate, premeditated killing. The prosecutor's arguments merely corrected the misrepresentations of defense counsel and correctly urged the jury to base its determination of the punishment issues on the evidence before them.

This Court is without jurisdiction to review Modden's claim that the prosecutor's use of peremptory challenges and challenges for cause violated the Court's mandate in Batson v. Kentucky, 476 U.S. 79 (1986), because the issue was neither presented to the court below nor sua sponte considered by the court. For the same reason, this Court lacks jurisdiction to review Modden's claim that the Texas capital sentencing statute precludes meaningful consideration of mitigating evidence.

The court below correctly denied Modden's claim that the use of challenges for cause violated the Sixth Amendment "fair cross-section" requirement. The Sixth Amendment does not require petit juries, as opposed to jury panels or venires, to reflect the composition of the community at large.

REASONS FOR DENYING THE WRIT

I.

THE QUESTIONS PRESENTED FOR REVIEW ARE UNWORTHY OF THIS COURT'S ATTENTION.

Rule 17 of the Rules of the Supreme Court provides that review on writ of certiorari is not a matter of right, but of sound discretion, and will be granted only when there are special or important reasons therefor. Modden advances no special or important reason in this case, and none exists. Further, the

issues in this case involve only the application of established constitutional principles to the facts. Thus, the petition presents no important questions of law to justify this court's exercise of its certiorari jurisdiction.

II.

THE PROSECUTOR'S ARGUMENT DID NOT MISLEAD THE JURORS AS TO THEIR RESPONSIBILITY FOR ASSESSING PUNISHMENT.

Modden alleges that the prosecutor's closing argument during the punishment phase of the trial violated his Eighth Amendment rights and this Court's holding in Caldwell v. Mississippi, 472 U.S. 320 (1985). According to Modden the jury was led by the following argument to believe that the answers to the special issues were not to be determined by the jury and that the responsibility for determining the appropriateness of the death penalty rested elsewhere:

> You answer the questions. You are following the law. You don't say anything about anything, except if these questions are right or wrong. Are they "yes" or "no"?
>
> What happens to him after that, you will never see him. You will never be in a position of plunging a needle into him over and over. You are not going to ever get to the point where Willie Mack was. You will never get to that point.
>
> You didn't even, you didn't even answer these questions. You didn't do that. The facts and acts as there were committed answered these questions.
>
> You merely look at the evidence and seen the answer that was placed there by you; placed there for you by Willie Mack Modden. And you take those answers and you record them on paper.

(SF XXVI 2888-89).[2]

In Caldwell, this Court held that a death sentence may not be based on the determination of a jury which has been led to believe that the responsibility for determining the

---

[2]"SF" refers to the statement of facts of Modden's trial, filed in the appellate record in the court below, and is followed by referenced volume and page number.

appropriateness of a death sentence rests not with the jury but with the appellate court which later reviews the case. Id. at 328-29. The Court's rejection of the prosecutor's argument in Caldwell was founded in its determination that the argument was inaccurate, both because it was misleading as to the nature of appellate review and because it depicted the jury's role in a way fundamentally at odds with the role that a capital jury must perform. Id. at 336. Moreover, the Court found that the argument could not be justified as relevant to any arguably valid sentencing consideration. Id., citing, California v. Ramos, 463 U.S. 992 (1983) (disclosure to the jury of governor's ability to commute a sentence of life without parole into lesser sentence that included possibility of parole was appropriate because the information was relevant to the issue of the defendant's future dangerousness should he be returned to society).

The Texas Court of Criminal Appeals correctly concluded that the argument at issue here did not lead the jury to believe that responsibility for determining the appropriateness of the death penalty rested elsewhere and, thus, did not come within the parameters of this Court's concerns in Caldwell. Unlike the argument in Caldwell, the argument challenged by Modden correctly urged the jury to follow the law and base its determination of the two punishment issues on the evidence before it (SF XXVI 2867-69). See California v. Brown, 479 U.S. ___, 107 S.Ct. 837 (1987) (the state has a legitimate interest in insuring jurors will base their assessment of sentence on facts, not sympathy); Wainwright v. Witt, 469 U.S. 412, 420 (1985); Adams v. Texas, 448 U.S. 38, 44 (1980) (the state has a legitimate interest in obtaining jurors who can follow their instructions and oath and conscientiously apply the law to the facts adduced at trial).

Moreover, the argument was responsive to that of defense counsel, who argued that the death penalty is inappropriate under any circumstances and that the jury should return negative answers to the punishment questions based not on the evidence, but as a rejection of capital punishment. In defense counsel's

closing diatribe against capital punishment, he argued that the death penalty cannot be justified on the ground that it deters crime and that European and South American countries, in recognition of this fact, have abolished the death penalty (SF XXVI 2830-50). Counsel argued that various Christian sects, including those which were represented on the jury, opposed capital punishment (SF XXVI 2847-49) and that, as Christians, they should take a fresh look at the evidence and arrive at a Christian conclusion (SF XXVI 2830, 2852). Defense counsel analogized the assessment of the death penalty to a "deliberate, cool, premeditated" killing and argued that "you can[not] rectify the killing of one human being by the killing of another human being" (SF XXVI 2819). Counsel then attempted to deflect the jury's attention from Modden's crime and character, and shifted the onus of the death penalty's imposition to the jury by stating:

> [T]he state has given you a weapon, and there are two barrels to that weapon, both of them involving a "yes" answer.
>
> Each of you is going to have to fire both barrels at this defendant by your answers. Each of you individually are going to have to consider killing the person.

(SF XXVI 2814).

> You and you alone can send Willie Mack Modden to lethal injection. There can be no division of responsibility. You can never say that the rest overpowered you individually, in your individual capacity as juror. It must be your deliberate, cool, premeditated act. It takes your vote.

(SF XXIV 2852).

Defense counsel thus urged the jurors not to follow the law, to base their assessment of appropriate punishment on sympathy rather than the facts of the case, and to view themselves as murderers if they assessed the death penalty. In response, the prosecutor argued that the jury was not responsible for the evidence upon which it was to base its answers to the punishment questions, that Modden was responsible for the evidence, and that the assessment of the death penalty was not comparable to

Modden's taking of human life. Contrary to the assertion made by Modden, the prosecutor's argument did not minimize the jury's role in assessing punishment. The argument correctly urged the jurors not to follow the suggestions of defense counsel to disregard the facts and the law, but rather to base their answers to the punishment questions on the evidence before them. Arguments, such as these, which are "invited" and do no more than respond substantially in order to "right the scale," do not warrant reversing a conviction. United States v. Young, 470 U.S. 1, 13-14 (1985); Darden v. Wainwright, 477 U.S. ___, ___, 106 S.Ct. 2464, 2472 (1986).

III.

THIS COURT IS WITHOUT JURISDICTION TO CONSIDER MODDEN'S CLAIM THAT THE PROSECUTION'S USE OF PEREMPTORY CHALLENGES AND CHALLENGES FOR CAUSE VIOLATED THIS COURT'S RULING IN BATSON V. KENTUCKY.

In Batson v. Kentucky, 476 U.S. 79 (1986), this Court held that the Equal Protection Clause of the Fourteenth Amendment forbids the use of peremptory challenges by the state to exclude from the jury members of the defendant's race solely on account of their race or on the assumption that jurors of that race as a group will be unable to impartially consider the state's case. In the instant petition, Modden alleges that the prosecution's use of peremptory challenges and challenges for cause to exclude black members of the venire violated this Court's ruling in Batson. This claim was not presented to the court below. In the court below, Modden presented a Sixth Amendment fair cross-section challenge to the prosecutor's use of challenges for cause rather than a Batson Equal Protection claim. Modden v. State, 721 S.W.2d at 862 n.4.[3]

---

[3]In an apparent attempt to obtain review from this Court of his Batson claim, Modden intertwines the Sixth Amendment claim which was raised in the court below, with a Batson Equal Protection challenge and incorrectly asserts that the decision in Batson was based on the Sixth Amendment as well as Equal Protection grounds. The holding in Batson was in no way based on

(Footnote Continued)

The cases are legion that this Court will not decide issues raised for the first time on petition for certiorari or on appeal, and that the Court will not decide federal questions not raised and decided by the court below. E.g., Heath v. Alabama, ___ U.S. ___, 106 S.Ct. 433, 436-37 (1985); Illinois v. Gates, 462 U.S. 213, 218-222 (1983); Tacon v. Arizona, 410 U.S. 351, 352 (1973); Hill v. California, 401 U.S. 797, 805-06 (1971); Cardinale v. Louisiana, 394 U.S. 437, 438 (1969). In articulating this requirement, the Court has stressed the long-standing nature of the rule: "[I]n Crowell v. Randell, 10 Pet. 368 (1836), Justice Story reviewed the earlier cases commencing with Owings v. Norwood's Lessee, 5 Cranch 344 (1809), and came to the conclusion that the Judiciary Act of 1789, 20 § 25, 1 Stat.85, vested this Court with no jurisdiction unless a federal question was raised and decided in the state court below. 'If both of these do not appear on the record, the appellate jurisdiction fails.' 10 Pet. 368, 391." Cardinale v. Louisiana 394 U.S. at 439. To properly invoke the jurisdiction of the Court, it is crucial that the federal question not only be raised in the prior proceedings, but that it be raised at the proper point. Beck v. Washington, 369 U.S. 541, 550 (1962); Gochaux Co., Inc. v. Estopinal, 251 U.S. 179, 181 (1919).

The record clearly reflects that Modden did not present his Equal Protection claim regarding the use of peremptory challenges or challenges for cause, or a Sixth Amendment claim regarding the state's use of permeptory challenges to the court below. Hence the Court lacks jurisdiction to consider them.

(Footnote Continued)
a Sixth Amendment right to a jury which reflects a representative cross-section of the community. Indeed, the Court in Batson expressly declined to address the "fair cross-section" challenge to the discriminatory use of peremptory strikes. Batson v. Kentucky, 476 U.S. at 84 n.4.

IV.

THE PROSECUTOR'S PROPER USE OF CHALLENGES FOR CAUSE, WHICH RESULTED IN THE REMOVAL OF BLACK VENIRE MEMBERS, DOES NOT IMPLICATE THE SIXTH AMENDMENT.

In his only claim relating to jury selection that is arguably preserved for review, Modden asserts that the prosecutor's use of challenges for cause resulted in the removal of all black venire members, except one, from his petit jury. This, he contends, deprived him of his Sixth Amendment right to a jury composed of a representative cross-section of the community. The court below correctly concluded that the use of challenges for cause did not violate the Sixth Amendment "fair cross-section" requirement. The Sixth Amendment does not require "petit juries, as opposed to jury panels or venires, to reflect the composition of the community at large." Lockhart v. McCree, 476 U.S. 162, 173 (1986), citing Taylor v. Louisiana, 419 U.S. 522, 538 (1975); Batson v. Kentucky, 476 U.S. at 85, citing Strauder v. West Virginia, 100 U.S. 303, 305 (1880) (a defendant has no right to a petit jury composed in whole or in part of persons of his own race).[4] Moreover, it is implicit in the Court's reasoning in Batson and Lockhart that the proper exercise of challenges for cause implicates no constitutional guarantee. See Lockhart v. McCree, 476 U.S. at 173 ("We have never invoked the fair cross section principle to invalidate the of either for-cause or peremptory challenges to prospective jurors . ..."); Batson v. Kentucky, 476 U.S. at 97 (prosecutor's explanation why

[4]Modden does not claim in the instant petition that members of the jury panel were erroneously excluded for cause under Wainwright v. Witt, 469 U.S. 412 (1985) and Adams v. Texas, 448 U.S. 38 (1980). The court below held that challenges to the removal of all but one of the venire members excluded for cause were procedurally barred as a consequence of Modden's failure to object. The court noted, however, that each juror had been removed after stating that he or she would be unable to vote for the death penalty under any circumstances and that their removal was proper under Tex. Crim. Proc. Code Ann. § 35.16(b) and Witt and Adams.

he exercised a peremptory challenge "need not rise to the level justifying exercise of challenge for cause.").

V.

THIS COURT IS WITHOUT JURISDICTION TO CONSIDER MODDEN'S CLAIM THAT THE TEXAS CAPITAL SENTENCING STATUTE IMPERMISSIBLY PRECLUDES MEANINGFUL CONSIDERATION OF MITIGATING EVIDENCE BY THE JURY.

Modden's claim that the Texas capital sentencing statute precludes meaningful consideration of mitigating evidence, by his concession, was not raised in the court below. (See petition at page 4.) As discussed in Section III supra, this Court is without jurisdiction to decide federal questions not raised and decided by the court below.

CONCLUSION

For the foregoing reasons, the state respectfully requests that the petition for writ of certiorari be denied.

Respectfully submitted,

JIM MATTOX
Attorney General of Texas

MARY F. KELLER
Executive Assistant Attorney
General for Litigation

MICHAEL P. HODGE
Assistant Attorney General
Chief, Enforcement Division

ROBERT S. WALT*
Assistant Attorney General

Margaret Portman Griffey

MARGARET PORTMAN GRIFFEY
Assistant Attorney General

P.O. Box 12548, Capitol Station
Austin, Texas 78711
(512) 463-2080

ATTORNEYS FOR RESPONDENT

* Counsel of Record